

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1497

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA, :

Appellee, :

- against - :

MOSES WEINDLING and :
PATRICIA JOANNE McINTYRE, :

Defendants-Appellants. :
-----X

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT,
PATRICIA JOANNE McINTYRE

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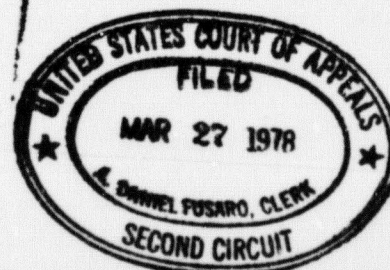


TABLE OF CONTENTS

	Page
Issues Presented for Review-----	1
Nature of Case-----	2
Statement of Facts-----	3
Argument	
I. The Court has jurisdiction to hear this appeal-----	24
II. Weindling's statement exonerating McIntyre of guilt should have been admitted into evidence-----	25
III. The trial court erred in permitting highly prejudicial and speculative redirect testimony purporting to identify an alleged co-conspirator as McIntyre's close friend-----	37
IV. The trial court erred in permitting the prosecution to repeatedly state that McIntyre's close friend defin- itely was a co-conspirator even though the relevant testimony was highly speculative and uncertain---	42
V. The prosecution's cross-examination of McIntyre was inflammatory, improp- er and highly prejudicial-----	44
A. The inflammatory Playboy Bunny issue-----	44
B. The extrinsic evidence used to impugn McIntyre's charac- ter on collateral issues---	46
C. The prosecution's unsupport- ed gun "joke"-----	47
VI. Appellant McIntyre adopts all argu- ments raised by appellant Weindling in his brief insofar as some are ap- plicable to her-----	47
Conclusion-----	48

CITATIONS

Cases:	Page
<u>Chambers v. Mississippi</u> , 410 U.S. 284 (1975)-----	37
<u>Corey v. United States</u> , 375 U.S. 169 (1963)-----	24
<u>Donnelly v. United States</u> , 228 U.S. 243 (1913)-----	26
<u>Iler v. United States</u> , 433 F.2d 8 (9th Cir. 1970)-----	24
<u>United States v. Bagley</u> , 537 F.2d 162 (5th Cir. 1976)-----	36
<u>United States v. Barrett</u> , 539 F.2d 244 (1st Cir. 1976)-----	27, 28,29,30,31,32,34
<u>United States v. Corrigan</u> , 168 F.2d 641 (2nd Cir.)-----	41
<u>United States v. Cox</u> , 536 F.2d 65, (5th Cir. 1976)-----	46
<u>United States v. Fort</u> , 409 F.2d 441 (D.C. Cir. 1969)-----	24
<u>United States v. Goodlow</u> , 500 F.2d 954 (8th Cir. 1974)-----	33
<u>United States v. Guillette</u> , 547 F.2d 743 (2d Cir. 1976)-----	26, 33,37
<u>United States v. Jackson</u> , 542 F.2d 162, (2d Cir. 1976)-----	24
<u>United States v. Masino</u> , 275 F.2d 129 (2d Cir. 1960)-----	46
<u>United States v. Provoo</u> , 215 F.2d 531 (2d Cir. 1954)-----	41

CITATIONS

Cases:

	Page
<u>United States v. Santos</u> , 385 F.2d 43 (7th Cir. 1967)-----	47
<u>United States v. Spangelet</u> , 258 F.2d 338 (2d Cir. 1958)-----	43
<u>United States v. Tomaiola</u> , 249 F.2d 683 (2d Cir. 1957)-----	46
<u>United States v. White</u> , 553 F.2d 310 (2d Cir. 1977)-----	32

Statute and rules:

Federal Rules of Evidence:

Rule 403-----	42
Rule 608(b)-----	46,
	47
Rule 804(b)(3)-----	25,
	26,27,29

**STATEMENT OF ISSUES PRESENTED
FOR REVIEW**

1. Where a co-defendant repeatedly in the course of a confession exculpates the defendant, and the co-defendant does not testify at the trial, should the exculpatory portion of the confession be totally kept from the jury on the ground it is not a declaration against interest?

The lower court answered in the affirmative.

2. Where defense counsel on cross-examination asks whether the prosecution's witness knows the identity of an alleged co-conspirator, and the witness answers unequivocally no, does this open the door to speculation on the prosecution's redirect that the person in question may have been a close friend of the accused?

The lower court answered in the affirmative.

3. Where a prosecution witness has speculated that an alleged co-conspirator possibly may be a close friend of the accused, should the prosecution in summation, over repeated objection, be permitted to state that the witness was definitely and certainly identified as the defendant's close friend?

The lower court answered in the affirmative.

NATURE OF THE CASE

This appeal is from a judgment of conviction and sentence rendered on December 9, 1977.

The appellants, Patricia Joanne McIntyre (hereafter "McIntyre") and Moses Weindling (hereafter "Weindling"), in an indictment returned in the Southern District of New York on June 23, 1977, were jointly charged with: (1) allegedly conspiring to violate 21 U.S.C. 841, the conspiracy allegedly being to distribute, and to possess with intent to distribute, controlled narcotic substances (Count I); (2) allegedly intentionally and knowingly distributing, and possessing with intent to distribute, 4.1 grams of cocaine on April 28, 1977, in alleged violation of 21 U.S.C. 841 (Count III); and (3) allegedly intentionally and knowingly possessing, with intent to distribute, on April 28, 1977, 3.5 ounces of cocaine (Count IV).

Only Weindling was charged under Count II which alleged a similar offense on April 27, 1977.

The case was assigned to Judge Richard Owen. McIntyre and Weindling were jointly tried before a jury in late October,

1977. The jury found each defendant guilty on all counts charged.

On December 9, 1977, Weindling was sentenced to five years imprisonment to be followed by five years special probation. McIntyre was sentenced upon the first count only, pursuant to 18 U.S.C. 5010(e), according to the provisions of which she would be confined for a sixty-day period of "observation and study".

McIntyre's notice of appeal to this Court was served and filed on December 19, 1977. Pending decision upon her appeal, McIntyre's bail was continued by a stipulation filed December 22, 1977.

After a hearing on January 6, 1978, the lower court directed that McIntyre be furnished with the trial transcript at no expense upon a finding of her inability to pay for it. Accordingly, McIntyre has proceeded in this Court upon the original record pursuant to Fed. R. App. P. 30(f) and §30(2) of the Rules of this Court.

STATEMENT OF FACTS

The prosecution's first witness at the trial was

Anthony Minichiello. Minichiello, a detective with the New York City Police Department, functioned as an undercover agent in this case (Tr. 34-35).*

Minichiello had met Weindling on April 27, 1977 through an informant, "Steve" (Tr. 39-40). This initial meeting was at the Sixish Restaurant in Manhattan. McIntyre was not present (Tr. 40). Weindling delivered a sample of cocaine to Minichiello, which Minichiello pretended to sample in the men's room (Tr. 41-42). They then discussed a sale of 3.5 to 4.5 ounces (Tr. 43).

McIntyre, Weindling's girlfriend, later joined the group at the restaurant (Tr. 48). Minichiello testified that Weindling "indicated that he wanted to play a number." Evidently, Minichiello was to pay for Weindling's playing the number as part of the price for the cocaine (Tr. 51). Weindling then asked McIntyre for a number, and she suggested the number 357 (Tr. 48).

Minichiello, Weindling, McIntyre and the informant met for lunch the next day, April 28, 1977, at a restaurant

*

References to the trial transcript are indicated by the designation "Tr." followed by the appropriate page number(s).

on the upper east side of Manhattan (Tr. 51-52). The lunch began at about 2:30 p.m. (Tr. 52). In addition to Minichiello, there were five to seven "backup" government agents in or outside the restaurant (Tr. 115).

Weindling and Minichiello were seated on the same side of the table. Across the table were the informant and McIntyre (Tr. 117). During the course of the next two hours, Minichiello overheard the informant and McIntyre talk about a trip to Florida and about a cat or dog of hers that was at a veterinarian's. Minichiello testified that McIntyre told the informant that she had to make a call to find out how the animal was (Tr. 118).

McIntyre later testified that she was worried that day about her cat since it had broken its leg and was at a hospital. She testified that she had to call the hospital before 4:30 p.m. (Tr. 474).

Soon after they sat down, Weindling told Minichiello that he could sell him 3.5 ounces of cocaine, and that he would first give him a sample of the "package" (Tr. 54). Weindling, seated to Minichiello's immediate left, then reached inside his boot and handed Minichiello

a clear plastic bag containing the sample (Tr. 54). No evidence at all was presented to indicate that McIntyre heard this conversation or saw the transfer of the sample.

Minichiello claimed that McIntyre participated in his conversation with Weindling only to the extent of allegedly stating to him that she had tried the cocaine the night before and that it "was so good" it had caused a discoloration of her nose (Tr. 56-57). McIntyre then asked Minichiello if he thought the discoloration would go away and he promptly assured her that it would (Tr. 122). This alleged exchange was strenuously denied by McIntyre who testified that she had not even been with Weindling the night before (Tr. 574).

The prosecution and McIntyre agreed that at some point shortly thereafter, McIntyre left the table and went downstairs to the ladies' room (Tr. 61 & 468). The prosecution's testimony was that McIntyre got up from the table to go to the ladies' room at 4 to 4:30 p.m. (Tr. 61 & 432-33). McIntyre testified that the time was about 4 to 4:10 p.m. (Tr. 468).

A short time later, McIntyre came back up the stairs and started toward the table. Weindling then allegedly said

to Minichiello, "Doesn't she look good with \$4500 worth of cocaine on her?" (Tr. 62). Weindling's alleged hearsay statement was admitted into evidence despite a previous objection (Tr. 42).

According to Minichiello, McIntyre handed her pocketbook to Weindling when she got to the table (Tr. 62). McIntyre testified that she handed her pocketbook to Weindling at his request when she got back to the table only because she thought he wanted to pay the bill and because she was carrying his money for him so his pockets would not bulge, since he was "vain" (Tr. 471-72). Minichiello testified further that Weindling then opened her pocketbook, and with one hand inside it and one on the bottom, he allegedly passed the bag below the table line and put it into Minichiello's lap (Tr. 62). Minichiello claimed that he saw a white, three inch by eight inch business envelope, the flap of which was closed but not sealed, in the handbag. While the handbag was still in his lap, he lifted the flap of the envelope. Inside the envelope he claimed to have seen a small, completely sealed brown paper bag which he then punctured; inside it he claimed were three plastic bags containing

a rock-like substance and a small amount of powder (Tr. 63-64).

There was no evidence of any kind to suggest that McIntyre saw the bag being passed; the fact that she was seated on the other side of the table and that the bag was being passed below the table line indicates that she could not possibly have seen any transfer. Nor was there any direct evidence whatsoever that McIntyre knew what was inside the alleged closed white business envelope in her handbag. As previously noted, McIntyre testified that Weindling was "vain" about his pockets bulging and had given her some of his possessions to carry in her handbag (Tr. 472).

Minichiello, telling Weindling that he would get the money, returned the handbag to him (Tr. 65-66), got up, and walked out the door of the restaurant to a parked car; once outside, he gave through the window a pre-arranged arrest signal to the backup agents still in the restaurant (Tr. 66 & 227).

Jon Hansen, one of the backup agents inside, testified that while Minichiello was going by his table,

on his way out of the restaurant, McIntyre got up and walked to and then down the stairs leading to the ladies' room and pay telephones (Tr. 156-58).

Another backup agent inside, John DeRosa, testified that it was 10 to 15 seconds from the time Minichiello got up from the table until he gave the arrest signal and that McIntyre left the table within 5 to 6 seconds. Upon seeing the signal several seconds later, DeRosa gave an order: "Bust them" (Tr. 227). Hansen then went directly to the top of the restaurant stairs, paused momentarily, went to the bottom of the stairs and saw McIntyre with the phone to her ear. He told her she was under arrest. She hung up the phone and the dime came back out, indicating the call was not completed (Tr. 157). The arrest of McIntyre occurred less than a minute after the arrest signal was given (Tr. 228).

McIntyre testified that she left the table to call the Animal Medical Center about her cat, and in order to do so, she had taken her handbag back from Weindling (Tr. 475).

Immediately after arresting McIntyre, the police examined her handbag; they found absolutely no cocaine but allegedly only some papers and lipstick (Tr. 158, 218 & 240).

Despite these facts, the prosecution contended strenuously at the trial that McIntyre had disposed of the drugs during the less than a minute after the arrest signal was given, even though there was absolutely no evidence that she had seen the signal or any of the subsequent police actions (Tr. 659-660).

THE MYSTERIOUS BRUNETTE

Hansen testified further as to the alleged events that occurred when McIntyre went downstairs for the first time to the ladies' room. Hansen claimed that after McIntyre went to the stairs, a brunette girl got up from a table and walked downstairs right behind her; he claimed he saw them go down somewhat together (Tr. 156 & 172).

DeRosa's testimony was conflicting. He testified that the brunette, the younger of two women seated at a

table in the restaurant, did not go downstairs until two to three minutes after McIntyre (Tr. 214-15).

A waitress, Sandra Jeronimo, testified for the government. She stated that she worked at the restaurant on April 28, 1977, the day in question (Tr. 404). During 4 to 4:30 p.m. (Tr. 432-33) she went downstairs to the ladies' room and saw a tall, blonde woman, whom she later identified as McIntyre, and a brunette woman speaking to each other in low tones (Tr. 407-08). For the conversation to have been conducted in low tones is highly reasonable since the ladies' room is quite small (Tr. 409). She claims that after she entered the ladies' room she heard the brunette say, "That's the best I can do for you", or "That's the best advice I can give you" (Tr. 409-10). The broad range between these two alternatives strongly suggests that the witness did not hear very clearly or has forgotten.

Jeronimo admitted on cross-examination that she had not spoken with any police officers or the United States attorney regarding this alleged conversation until

about two weeks before the trial (Tr. 415-416). She further admitted that April 28, 1977 was a very busy day at the restaurant (Tr. 432).

The prosecution sought to convince the jury that the brunette in the ladies' room had transferred to McIntyre the alleged white envelope allegedly containing 3.5 ounces of cocaine (Tr. 655) based on Jeronimo's highly equivocal testimony. Jeronimo heard no conversation whatsoever relating in the slightest to drugs and saw absolutely no physical transfer of any kind. McIntyre, a former airline stewardess trained to be congenial to people, testified that she quite frequently speaks with women in the ladies' room (Tr. 483).

On cross-examination, DeRosa was asked whether he knew the identify of this mysterious brunette and of the older woman who was seated with her. He stated he did not know who they were (Tr. 229).

On redirect, the government asked the witness whether over the last week he had "begun an investigation to uncover the identity of the brown-haired woman" (Tr. 271). Defense counsel promptly objected (Tr. 271). A side bar

conference followed, the court deciding (Tr. 276) that the question on cross had opened the door to this testimony.

De Rosa was then again asked by the United States whether he had been instructed during the week prior to the trial to conduct an investigation "relative to the identity of that brunette woman." Over the objection of both defense counsel, DeRosa stated that he had been so instructed (Tr. 277). He was then asked whether he now has "some knowledge that would lead you to believe who may be the young brunette woman" (Tr. 277, emphasis supplied). Over the objection of both defense counsel, the Court rephrased the question and asked the witness:

"THE COURT: What is your state of knowledge as to that person?

"THE WITNESS: I have an idea of who it might be.

"MR. JOY: I ask that that be stricken as not responsive.

"THE COURT: I will overrule that" (Tr. 278, emphasis supplied).

The prosecution continued:

"Q Have you uncovered the identity of a particular person whom you believe may be the brunette?

"A Yes, I have.

* * *

"Q Do you know the name of that person?

"A Yes, I do.

MS. COTE: At this point does the Court require us to reveal that name?

(Pause.)

"Q Please tell the ladies and gentlemen of the jury what the name of that particular individual is.

"A Patricia Thomas

"Q Do you know how Ms. Thomas is presently employed?

"A She is a flight attendant for Eastern Airlines.

"Q Do you know what Ms. McIntyre's job was when she was arrested?

MR. JOI: I object to that.

THE COURT: Overruled.

"A Flight attendant for Eastern Airlines.

"Q Do you know what if any relationship there is between Ms. Thomas and Ms. McIntyre?

"A Yes. They are close friends and at

one time they resided together" (Tr. 278-79, emphasis supplied).

Thus, the witness, who originally stated that he had no more than an idea of "who it might be" was allowed to testify over objection that he definitely knew that the brunette in the ladies' room was McIntyre's close friend.

This testimony attempted to buttress the government's previously vague and equivocal testimony, the government attempting to lead the jury to believe that McIntyre got 3.5 ounces of cocaine from a brunette in the ladies' room and that McIntyre was allegedly later aided downstairs by the same brunette in disposing of the cocaine during the less than one minute between the arrest signal and her arrest (Tr. 659-60). The escalation of DeRosa's vague "maybe" into a purported certainty was extremely damaging to McIntyre.

In summation, over repeated objection, the government sought to persuade the jury that Patricia Thomas, McIntyre's close friend, had been definitely identified as the mysterious brunette, stating:

"Was this just any other brunette? Is this just a coincidence that the brunette in Grass Restaurant was a former room-mate of Miss McIntyre, someone who knows both the defendants, who was a stewardess for Eastern Airlines?

"MR. JOY: I object, your Honor. There is no testimony that she was in the restaurant at all.

"THE COURT: I think the record will support that argument.

"MISS COTE: I believe, if you remember, Detective DeRosa was asked how sure was he that the brunette he saw in Grass Restaurant on the 28th was Patricia Thomas, and if you remember he said he was 95 percent sure.*

"So what is Patricia Thomas doing in this case? The Government didn't bring her to Grass Restaurant on the 28th; the defendants did that.

"MR. ANOLIK: Objection. There is no evidence to support that at all.

"THE COURT: Overruled.

"MISS COTE: What happens to Patricia Thomas? That's a matter for another day. But on the facts of this case --

*
DeRosa testified that he was 85 percent sure, and therefore had "some doubt at the present time" (Tr. 283)

"MR. ANOLIK: I object to that. That's completely improper.

"MR. JOY: I join in that, your Honor.

"THE COURT: Proceed.

"MISS COTE: On the facts of this case and from the evidence given to you, and from your good common sense, you can figure out what happened at Grass Restaurant on the 28th and where Patricia Thomas fits in.

* * *

"Remember this: Miss Thomas was down there too because Detective DeRosa told you he saw Miss Thomas go down, and he kept his eyes on that stairway and he didn't see her come up.

* * *

"No, it was no accident that Miss Thomas was in that restaurant. She was not asked by a friend to drop by while she was driving her bike along. She was there to help. We didn't bring her to that restaurant; the defendants did. " (Tr. 743 through 745).

THE MCINTYRE CROSS-EXAMINATION

A.

Early in the McIntyre cross-examination the United States raised the issue of the "357" number that

McIntyre had given Weindling on April 27th (supra at 4).

In response to questions, McIntyre asserted that these were simply "three odd numbers" "off the top of my head" (Tr. 488). When asked whether she had a conversation with Weindling about the number, she replied that she had asked him why he wanted a number and he answered: "Never mind, honey, just pick a number" (Tr. 488-89).

The government, in the course of its next question, stated that Weindling joked with McIntyre about the number (Tr. 489) although there had been no testimony by Minichiello or any other witness as to any such joke. Defense counsel objected on the ground of "assuming a state of facts not in evidence". The objection was overruled (Tr. 489).

The United States then suggested that Weindling had joked that "she [McIntyre] carries the gun in the family" and asked McIntyre if she had "heard of a .357 magnum." McIntyre replied that she believed she had: "My brother is a State policeman... I have heard of all kinds of guns" (Tr. 489).*

*

The alleged joke, for which there was no support in the record, was repeated by the government at Tr. 547 and was stressed in the government's summation (e.g., Tr. 758).

B.

In order to understand the cross-examination of McIntyre that followed, it is necessary to review some prior testimony.

Ms. Jeronimo, the waitress, on direct examination said that at one point she heard McIntyre say "Oh shit" (Tr. 410).

McIntyre was asked about this on direct and replied:

"I don't recall saying that, because I generally don't swear, but, it's possible..." (Tr. 474).

On direct, McIntyre was asked with reference to April 28, 1977 at the restaurant:

"Q. Did you have lunch?

"A. Yes, we did

"Q. Did you have some drinks?

"A. I don't drink. Are you referring to myself?

"Q. I mean the people who were at your table.

"A. Yes. (Tr. 465)."

In cross-examination the government sought to elicit testimony that McIntyre had been employed as a Playboy "Bunny"

(Tr. 504-508).

Defense counsel promptly objected. A side bar conference was called at which McIntyre's counsel stated:

"The Government is attempting to blacken her character pointing out she was a Playboy Bunny, she lived in Florida, that she was married and divorced or separated, and I think this is nothing whatever other than just a character assassination. This has nothing to do with her truthfulness or veracity. It's an effort by the Government to try to blacken her character " (Tr. 505-06).

The court overruled the objection, claiming that the impression might have been created on direct that McIntyre was "a dewy-eyed high school girl from Irwin, Pennsylvania that has come to New York and doesn't drink or smoke or swear" (Tr. 506). (This conclusion of the court was evidently based on the testimony summarized supra at 19).

McIntyre had testified that she had lived with Moses Weindling for about four months in 1976 (Tr. 455-56), had seen him use cocaine and had tried cocaine herself (Tr. 457-58). It is also to be noted that at the time of the court's ruling, McIntyre had stated that she had heard of all kinds of guns (supra at 18).

The court subsequently permitted the prosecution to elicit the fact that McIntyre had "worked as a dancer" "under my Playboy ruling and I would permit it on the theory you presented her as a dewy-eyed high school ..." (Tr. 510).

McIntyre then was asked and stated she worked for five months in early 1976 at the "Great Gorge Resort" (Tr. 513). She was then asked what she did there. She replied she "was a waitress and - cocktail waitress and commonly referred to as a Bunny (Tr. 514)". The prosecution then sought to stress this still further through questions such as "So you were a Playboy Bunny?" "Did you have any other job after being a Playboy Bunny ... ?", (Tr. 514), and "That was before or after you were a Playboy Bunny?" (Tr. 516)

C.

In later cross-examination, McIntyre was asked whether she had paid Weindling's air fare on trips they had taken together to Puerto Rico and to Pittsburgh (Tr. 557 & 560). She answered unequivocally in both cases that she had (Tr. 559-60). The government then was permitted to intro-

duce two documents to contradict her answer, over objection by defense counsel that the government was "not allowed to put in extraneous collateral matter" (Tr. 567) .

Several other collateral issues were raised on the McIntyre cross-examination attempting to impugn still further her character. Only one such issue will be raised here. The government asked McIntyre whether she was given Weindling's money by the police after the arrests. When McIntyre answered she had, she was asked the amount she had received. She answered, "... it must have been \$200" (Tr. 520) .

The government then sought to rebut this collateral testimony by recalling a prosecution witness, Special Agent Sandler, for the specific purpose of testifying that the amount given was \$900 (Tr. 600). Defense counsel objected (Tr. 600-01). The objection was overruled and the witness permitted to testify (Tr. 601) .

This testimony was important to the jury. During its deliberations the only request that it made was:

"Request the testimony of Agent Sandler (his second time on the stand) regarding the \$900 and the receipt Patricia McIntyre may or may not have signed." (Tr. 823)

WEINDLING'S CONFESSION AND THE
EXCLUSION OF HIS EXCULPATION OF MCINTYRE

Special Agent Sandler testified for the prosecution regarding an oral confession Weindling had given to the police shortly after his arrest. In that confession, Weindling allegedly stated that he had given Minichiello, the undercover agent, a sample of cocaine on April 27th and 28th, that he had 3.5 ounces for sale to him, and that he had gotten "the cocaine from Jose, who was a Cuban who lived on the West Side of New York" (Tr. 340, 341).

Repeatedly, during the course of his confession, Weindling asserted that McIntyre was innocent (Government's Pre-Trial Memorandum, p. 2). The Court ruled, however, that Weindling's exculpation of McIntyre could not be introduced into evidence (Tr. 4, 20-21 & 336). As noted above, however, testimony was permitted as to the portions of the confession in which Weindling inculpated himself.

ARGUMENT

POINT I

THE COURT HAS JURISDICTION TO HEAR
THIS APPEAL

McIntyre was sentenced on December 9, 1977 by Judge Owen under the first count of the indictment only. Sentence was deferred upon the remaining counts. The sentence under Count One, pursuant to 18 U.S.C. 5010(e), was that she be confined for sixty days for observation and study.

The courts have decided clearly and unquestionably that a defendant so sentenced can appeal after the imposition of such a sentence. Corey v. United States, 375 U.S. 169 (1963), United States v. Fort, 409 F.2d 441 (D.C. Cir. 1969), Iler v. United States, 433 F.2d 8 (9th Cir. 1970) and United States v. Jackson, 542 F.2d 162, 164 n.5 (2d Cir. 1976).

POINT II

WEINDLING'S STATEMENT EXONERATING
MCINTYRE OF GUILT SHOULD HAVE BEEN
ADMITTED INTO EVIDENCE

Weindling's confession was given to Special Agent Sandler a short time after his arrest. The content of the confession is stated(supra at 23). Repeatedly, during the course of his confession, Weindling asserted that McIntyre was innocent (Government's Pre-Trial Memorandum, p. 2). Nonetheless, this unequivocal assertion of McIntyre's innocence by her alleged co-conspirator was totally kept from the jury.

Weindling's exculpation of McIntyre should have been admitted into evidence under Rule 804(b)(3) of the Federal Rules of Evidence, which provides, in pertinent part:

"(b) HEARSAY EXCEPTIONS.- The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

* * *

"(3) STATEMENT AGAINST INTEREST.- A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against

another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement."

This Court has stated that Rule 804(b)(3):

"significantly departs from a prior rule in the federal system barring the use of such hearsay declarations that had stood since its inception in Donnelly v. United States, 228 U.S. 243, 33 S.Ct. 449, 57 L.Ed. 820 (1913). The significant change, of course, is that now declarations against penal interest are deemed an exception to the hearsay rule and subject to admission as such if there is sufficient corroborating evidence to indicate their trustworthiness". (United States v. Guillette, 547 F.2d 743, 754 (2d Cir. 1976).

The reason for this requirement of corroboration was stated by the Advisory Committee on the proposed rules as follows:

"The refusal of the common law to concede the adequacy of a penal interest was no doubt indefensible in logic [citing Holmes' Donnelly dissent], but one senses in the decisions a distrust of evidence of confessions by third persons offered to exculpate the accused arising from suspicions of fabrication either of the fact of the making of the confession or in its contents, enhanced in either instance by the required

unavailability of the declarant. Nevertheless, an increasing amount of decisional law recognizes exposure to punishment for crime as a sufficient stake. The requirement of corroboration is included in the rule in order to effect an accommodation between these competing considerations. When the statement is offered by the accused by way of exculpation, the resulting situation is not adapted to control by rulings as to the weight of the evidence, and hence the provision is cast in terms of a requirement preliminary to admissibility. The requirement of corroboration should be construed in such a manner as to effectuate its purpose of circumventing fabrication." [Citations omitted.]

Notes of Advisory Committee on Proposed Rules,
at 28 U.S.C.A. Fed.R.Evid. 804.

In United States v. Barrett, 539 F.2d 244 (1st Cir. 1976), the trial court had refused to admit into evidence the testimony of one James Melvin. An offer of proof had been made by defendant Barrett that Melvin would testify that he had been with one Ben Tilley at a card game. During the course of the game, Tilley inculpated himself and someone nicknamed "Buzzy" with respect to a "stamp theft". Melvin, apparently confused, then asked him did he mean "Bucky" or "Buzzy". Tilley said, "No, Bucky [Barrett] wasn't involved. It was Buzzy" (539 F.2d at 249). This exculpation of the defendant Barrett was excluded by the trial court.

The First Circuit held that error had been committed in the light of the newly-enacted Rule 804(b) (3), stating that two issues had to be resolved:

First, does the declaration "come within the hearsay exception as a 'statement against interest'?"

Second, if it does, "is there sufficient corroboration to clearly indicate trustworthiness?" (539 F.2d at 251).

In Barrett, the lower court had refused to admit Tilley's confession and exculpation on the ground that the exculpatory part was not against Tilley's interest (539 F.2d at 250). As a result, it never reached the issue as to whether there was sufficient corroboration to indicate the trustworthiness of the exculpation.

The First Circuit reversed, holding that the statements offered were "statements against interest within the Rule" and that

"the district court should have gone on to determine whether there was sufficient corroboration so as to warrant their admission" (539 F.2d at 251).

The court did not:

"overlook the fact that exculpating Barrett was not in itself against Tilley's interest,

since both could have participated in the crime - The district court seemed to suggest that in order for exculpatory remarks such as Tilley's to be admissible as against interest, the innocence of the accused must itself be prejudicial to the declarant. On the present facts, we read the first part of Rule 804(b)(3) more broadly, and conclude that so much of Tilley's remarks as exculpated 'Bucky' should here be considered as part of the statement against Tilley's interest." (539 F.2d at 252)

The First Circuit in Barrett vacated the judgment below and remanded the case, in the light of the facts of the case, taking no position on whether such corroborating circumstances were present and holding that Rule 804 (b) (3) invests the district court:

"with a substantial degree of discretion in making this important finding on trustworthiness, and therefore [we] prefer to let the district court rule first in the course of the new proceeding" (539 F.2d at 253).

The issue of the admissibility of Weindling's exculpation is virtually identical with the issue decided in Barrett. It may be that exculpating McIntyre was not in itself against Weindling's interest.* Nonetheless, the

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However, by exonerating McIntyre, Weindling tended to focus all guilt and prosecutorial effort upon himself.

declaration of McIntyre's innocence was an integral part of the declaration against interest. This is truer than in Barrett, where the statement of exculpation was made one time only and was the concluding portion of the entire declaration. Here, the Government's Pre-Trial Memorandum indicates clearly that Weindling's declaration of McIntyre's innocence occurred repeatedly and in the course of Weindling's confession (Government Pre-Trial Memorandum, p. 2).

Prior to the trial in this case, the Government requested a ruling on the admissibility of the exculpatory portion of Weindling's declaration and filed a memorandum of law arguing that the exculpatory portion was inadmissible (Tr. 3). The lower court then gave counsel for McIntyre until the next morning to file an opposing memorandum. The court, however, indicated its belief that the exculpatory portion was inadmissible, stating that:

"[T]he Government is more likely right than not here. The admission against interest is admissible because it is contrary to penal interest. The other is a sheer hearsay statement" (Tr. 4).

Counsel for McIntyre submitted a memorandum of law contending that "the exculpatory portions of the statements

are admissible under Rule 804(b)(3)" and specifically cited United States v. Barrett, supra.*

The court thereupon ruled that it had read the cases and was:

"of the view you may not ask Government agents on cross-examination as to this exculpatory statement" (Tr. 19).

The Court based its ruling partially on the fact that it felt that it was not yet certain that Weindling would not testify and partially on the fact that:

"I am fairly of the mind that this is not a statement against interest, as we discussed in the robing room not on the transcript; it seems to me entirely arguable here that if a person is arrested under circumstances where he feels that the authorities had the goods on him and by taking the rap to himself he can exculpate somebody else even though he knows that person is guilty, it is entirely psychologically consistent to say, 'All right, you have got me, but she's innocent....' I do not see that that statement is one against interest." (Tr. 20)

* This defendant's memorandum was erroneously not docketed and filed at the time of the trial. It was made a part of the record on this appeal by a stipulation dated January 17, 1978 between counsel for McIntyre and for the Government. The stipulation stated, inter alia, that the memorandum "was properly served prior to the ruling thereon by Hon. Richard Owen, U.S.D.J. and that it may be docketed ... and be part of the record on the appeal"

"In all fairness to you [counsel for McIntyre] I want you to be aware that my thinking is that they are severable parts, and one is against interest and one is in collective interest" (Tr. 22).*

This Court in United States v. White, 553 F.2d 310 (2d Cir. 1977), cert. denied 97 S. Ct. 2937 (1977), indicated that it takes a position on this issue similar to that taken by the First Circuit in United States v. Barrett supra. In White the Court stated:

"But Marquez and Seyfried, supra, involved situations where the declarant simultaneously tried to accept responsibility for a crime and to exculpate others. The Government argues that such exculpatory statements are particularly untrustworthy and that, therefore, exclusion of the exculpatory portion of the statement is appropriate. In fact, Rule 804(b)(3) provides that such exculpatory statements are not admissible 'unless corroborating circumstances clearly indicate' their trustworthiness" (553 F.2d at 313, emphasis supplied).

Thus, in White this Court indicated that declarations

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Weindling did not testify at the trial and was clearly unavailable since he was a witness. Prior to the lower court's preliminary ruling that the exculpatory portion of his confession was inadmissible, there is no indication that Weindling's counsel was asked if Weindling was going to testify. Much later in the trial, when testimony of Weindling's confession was about to be heard, the excluded exculpatory portion was again referred to (Tr. 336).

in which a "declarant [such as Weindling] simultaneously tries to accept responsibility for a crime and to exculpate others [e.g., McIntyre] are admissible if "corroborating circumstances clearly indicate their trustworthiness."*

The contrary position taken by the lower court in this case is that all "such exculpatory statements" are completely and totally inadmissible even if "corroborating circumstances clearly indicate their trustworthiness."

Since the lower court completely excluded Weindling's exculpation as not being a statement against interest, it never reached the crucial question, namely, whether corroborating circumstances are clearly present.

In United States v. Guillette, supra, this Court stated:

"The determination whether corroborating circumstances clearly indicate the trustworthiness of a third party confession lies within the sound discretion of the trial court, which is aptly situated to weigh the reliability of the circumstances surrounding the declaration. ..." (547 F.2d at 754).

Should the Court find harmful and prejudicial error to McIntyre as a result of the total exclusion of Weindling's

* A similar position had been taken by the Eighth Circuit in United States v. Goodlow, 500 F.2d 954 (8th Cir. 1974)

exculpation, it could reverse the judgment and remand for a new trial at which the district court could make a finding as to whether sufficient corroborating circumstances are in fact present. Such a course of action is strongly indicated because of the additional harmful errors involving McIntyre which occurred at the trial (Points II - V, infra). Such a course of action was followed by the First Circuit in United States v. Barrett, (supra at 29).

However, if this Court reaches the corroboration issue, then this appellant contends that there clearly are amply sufficient corroborating circumstances to warrant the admission of this exculpatory statement including:

1. McIntyre was not present on April 27th when the sample of cocaine was allegedly delivered by Weindling to Minichiello (supra at 4).

2. There was absolutely no evidence that McIntyre saw or had any knowledge of either of the two alleged cocaine transfers that occurred on April 28th. Since she was sitting on the side of the table opposite from Minichiello and Weindling, it was impossible for her to have seen transfers occurring below the table line (supra at 5-8). Furthermore,

she was engaged in a conversation with the informant seated next to her about her cat's broken leg and a trip to Florida. This was admitted by Minichiello (supra at 5).

3. She was at a telephone when arrested (supra at 9), having put a dime in the phone, within less than a minute after having left her seat at the table upstairs. This is extremely consistent with her testimony that she was calling the veterinarian to ask about her cat (supra at 9). Minichiello testified that he had heard McIntyre say earlier to the informant that she had to make a call to find out how her pet was (supra at 5).

4. A police search immediately following the arrest revealed that she had no cocaine and, further, that she had no instruments or tools relating to cocaine (supra at 10).

5. McIntyre testified that she was carrying Weindling's money for him so his pockets would not bulge, since he was "vain". She further testified that she handed her pocketbook to Weindling, at his request, when she got back to the table, only because she thought he wanted to pay the bill (supra at 7).

The above-cited evidence, and additional evidence in the record, demonstrates the trustworthiness of the content of the confession.

The Fifth Circuit, in United States v. Bagley, 537 F.2d 162, (5th Cir. 1976), cert. denied 429 U.S. 1075 (1977) stated that:

"The term trustworthiness has two distinct elements. In order for a declaration against penal interest to be trustworthy evidence, the statement must actually have been made by the declarant, and it must afford a basis for believing the truth of the matter asserted." (537 F.2d at 167).

The Court concluded:

"[T]he draftsmen of the rule were more concerned with the second element of reliability -- whether a statement offered to exculpate an accused was actually made." (537 F.2d at 167).

In this case, there are very strong corroborating circumstances to demonstrate that the statement made exculpating McIntyre was indeed actually made. The exculpatory statement was heard shortly after arrest by a Special Agent for the Federal Government who obviously was not biased in favor of exculpating McIntyre (supra at 23). By contrast, in United States v. Bagley, supra, the exculpatory statement was

made to a cellmate who did not even mention it until after his friend and cellmate was already dead (537 F. 2d at 167). Similarly, in United States v. Guillette, supra, the confession was made four months after the alleged crime while the declarant was drinking heavily (547 F. 2d at 754).

It is further contended on this appeal, as it was at the trial below, that the exclusion of the exculpation abridged and violated McIntyre's constitutional rights under the rules set by Chambers v. Mississippi, 410 U.S. 284 (1975).

The judgment of conviction should be vacated and the case remanded for a new trial.

POINT III

THE TRIAL COURT ERRED IN PERMITTING
HIGHLY PREJUDICIAL AND SPECULATIVE
REDIRECT TESTIMONY PURPORTING TO
IDENTIFY AN ALLEGED CO-CONSPIRATOR
AS MCINTYRE'S CLOSE FRIEND

A.

Since the government had absolutely no direct evidence implicating McIntyre and only weak circumstantial

evidence, it attempted to persuade the jury that during McIntyre's first trip downstairs, i.e., to the ladies's room, she had received 3.5 ounces of cocaine from a mysterious brunette (Tr. 655). If this were proved, of course, that would implicate McIntyre as a knowing participant in Weindling's alleged activities.

The government presented in support of this theory the weak and somewhat conflicting testimony of DeRosa and Hansen that they saw a brunette walk down right behind McIntyre (Hansen, supra at 10) or go downstairs two to three minutes after McIntyre (DeRosa, supra at 10-11).

The only other evidence presented by the government in support of this highly speculative theory was Jeronimo's testimony that she had seen McIntyre speaking "in low tones" with a brunette in the ladies' room (supra at 11).

This testimony was highly equivocal: for the conversation to have been conducted in low tones was entirely reasonable given that the ladies' room is quite small (supra at 11); furthermore, McIntyre, a former airline stewardess, had been trained to be readily congenial to people and testified that she quite frequently will speak

to another woman in a ladies' room (supra at 12). In addition, Jeronimo saw no physical transfer of any kind between the two women, let alone a transfer of drugs, and heard no conversation relating to drugs or crime.

B.

In redirect examination of DeRosa, the government was allowed to introduce highly speculative and prejudicial testimony to support its otherwise very weak evidence upon this theory. This testimony led the jury to believe that Patricia Thomas, a former roommate of McIntyre and her co-employee and close friend, was the "mysterious brunette."

On cross-examination of DeRosa, defense counsel had asked if DeRosa knew the identity of the "mysterious brunette" and her older companion. DeRosa replied that he did not (supra at 12).

The government, on redirect, sought to elicit from DeRosa his speculations as to the identity of the brunette. Both defense counsel objected. The lower court held that the question on cross examination had "opened the door" (supra at 12-13). This was clearly error.

The highly prejudicial examination that followed is quoted verbatim supra at 13-15 . During that examination, the prosecution asked DeRosa whether he had "some knowledge that would lead you to believe who may be the young brunette woman" (supra at 13). Upon the objection of both defense counsel, the court rephrased the question and asked the witness:

"THE COURT: What is your state of knowledge as to that person?

De Rosa replied:

"I have an idea of who it might be."

An objection followed that was overruled by the court (supra at 13).

The government then asked whether DeRosa knew the name of "that person", and he replied that he did, despite prior testimony which unequivocally indicated he could merely speculate as to her name (supra at 13). The prosecution then asked the court if it "require[s] us to reveal that name." There was a pause, no response from the court was forthcoming, and the witness then replied, "Patricia Thomas."

Over objection, the witness then testified that Patricia Thomas and McIntyre were both employed by Eastern Airlines, and that they were close friends and had been roommates (supra at 14-15).

This Court has stated that the doctrine of "opening the door":

"is an application of the principle of 'completeness'; that is, if one party to litigation puts in evidence part of a document, or correspondence or a conversation which is detrimental to the opposing party, the latter may introduce the balance of the document, correspondence or conversation in order to explain or rebut the adverse inferences which might arise from the fragmentary or incomplete character of the evidence introduced by his adversary." (United States v. Corrigan, 168 F.2d 641, 645 (2d Cir.) as quoted in United States v. Provoo, 215 F.2d 531, 534 (2d Cir. 1954).

It is clear that DeRosa's testimony regarding his speculations as to who the brunette might be were completely unnecessary to "explain or rebut" any adverse inferences that had been drawn. The government did not know who the brunette was and should not have been permitted to introduce pure speculation into the testimony.

Furthermore, the probative weight, if any, of the

testimony was greatly overbalanced by its great prejudice to McIntyre. The testimony thus should also have been excluded under Rule 403 of the Federal Rules of Evidence, which provides in pertinent part:

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice..."

POINT IV

THE TRIAL COURT ERRED IN PERMITTING
THE PROSECUTION TO REPEATEDLY STATE
THAT MCINTYRE'S CLOSE FRIEND DEFIN-
ITELY WAS A CO-CONSPIRATOR EVEN THOUGH
THE RELEVANT TESTIMONY WAS HIGHLY
SPECULATIVE AND UNCERTAIN

The government had to lead the jury to believe that Patricia Thomas, McIntyre's close friend, was the unidentified, mysterious brunette. The reasons for this are stated in Point III, supra.

Highly speculative and prejudicial testimony was permitted by the lower court that sought to identify Patricia Thomas as this woman (Point III, supra). This error was greatly compounded by the government's summation

upon this issue. The relevant parts of the summation are quoted supra at 15-17. They show clearly the flagrant, repeated statements by the government that Patricia Thomas had been definitely identified as the mysterious brunette. Repeated objections were made. Nonetheless, the court permitted the summation to continue, thereby compounding the distortion still further by indicating to the jury the court's belief that the prosecution was accurately re-stating the testimony.

This was clear and highly prejudicial error, United States v. Spangelet, 258 F.2d 338 (2d Cir. 1958).

POINT V.

THE PROSECUTION'S CROSS-EXAMINATION OF McINTYRE
WAS INFLAMMATORY, IMPROPER AND HIGHLY PREJUDICIAL

A. The inflammatory Playboy
Bunny issue

The prosecution in its cross-examination of McIntyre attempted to draw out that McIntyre had been a Playboy Bunny (supra at 19-20). Defense counsel promptly objected, pointing out that this was a form of character assassination (supra at 20). The lower court, however, refused to restrain the prosecution, claiming that the impression might have been created that McIntyre was "dewy-eyed" and "doesn't drink or smoke or swear" (supra at 20):

This was clear error. The image the court claimed could have been presented is not supported by record. Thus, it had been brought out on direct that McIntyre had lived with Weindling in 1976 for about four months (supra at 20). No attempt was made by McIntyre's counsel to explain away the obvious implications. Further, the jury had been told that McIntyre had seen Weindling use cocaine and nonetheless continued her relationship with him, that she had tried cocaine

herself and that she had heard of all kinds of guns (supra at 20).

It is submitted that this is not the dewy-eyed image the court referred to.

The asserted basis for the court's ruling was that McIntyre had supposedly testified that she did not drink or swear. Actually, she had testified that she generally did not swear, but it was possible she had said "Oh shit" on the day in question (supra at 19).

In addition, there is no relevance to the Playboy Bunny testimony upon the issue as to whether McIntyre drinks or swears. This was directly pointed out to the lower court by defense counsel (Tr. 506) but nonetheless the court overruled the objection.

In a cross-section of a community, from which jurors are drawn, prosecutors and criminal defense lawyers know that there are some people who regard Playboy Bunnies as prostitutes.

The great prejudice caused McIntyre by this error of the lower court is indicated by the prosecution's continual repetition of this fact before the jury (e.g. "That was before or after you were a Playboy Bunny?", supra at 21,

where such other examples are quoted). The prosecution was allowed to inflame the prejudices of the jury and a new trial is required (United States v. Masino, 275 F.2d 129, 133 (2d Cir. 1960), United States v. Tomaiola, 249 F.2d 683, 689 (2d Cir. 1957) and United States v. Cox, 536 F.2d 65, 71 (5th Cir. 1976)).

B. The extrinsic evidence used
to impugn McIntyre's character
on collateral issues.

The prosecution was allowed to introduce extrinsic evidence over objection contrary to the Federal Rules of Evidence, Section 608(b), which provides, in pertinent part:

(b) SPECIFIC INSTANCES OF CONDUCT.--Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

Despite the provisions of Rule 608(b), the lower court permitted the prosecution to introduce documents to impugn McIntyre's credibility on a wholly collateral issue (described supra at 21-22).

Of great damage to McIntyre and clearly in violation of 608(b), the prosecution was permitted to call a witness (Sandler) for the sole purpose of contradicting McIntyre's answer on a wholly collateral issue (the amount of Weindling's money the police gave her at the police station) (supra at 22). The prejudicial effect of this collateral diversion is demonstrated by the fact that the sole request from the jury during its deliberations was for this testimony (supra at 22).

C. The prosecution's unsupported
gun "joke"

The prosecution was permitted to state before the jury that Weindling had said McIntyre carries the gun in the family even though there was absolutely no evidence in support and even though prompt objection was made (supra at 17-18). This alleged declaration attributed to Weindling, an alleged co-conspirator, who did not testify, was not made during the course of and in furtherance of the alleged crime. United States v. Santos, 385 F.2d 43 (7th Cir. 1967). This was clear and prejudicial error.

The cumulative effect of the prejudice to this appellant clearly requires that a new trial be granted.

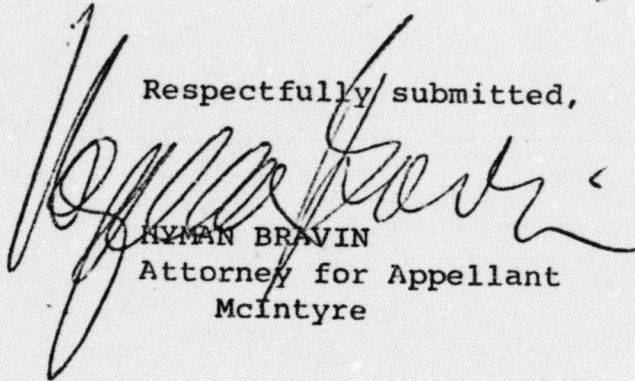
POINT VI

APPELLANT MCINTYRE ADOPTS ALL ARGUMENTS
RAISED BY APPELLANT WEINDLING IN HIS BRIEF
INsofar AS SOME ARE APPLICABLE TO HER

CONCLUSION

THE JUDGMENT AND SENTENCE OF THE LOWER
COURT SHOULD BE VACATED AND A NEW TRIAL
ORDERED

Respectfully submitted,



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Zoe Ann Pace .

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2. METADATA	
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REMARKS	